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ARTICLE

Imprisonment and Human Rights in Israel: Uncertainty and Volatility

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Abstract

This article provides an overview of the key issues in international and Israeli human rights standards related to incarceration from a legal and sociological perspective. We argue that the Israeli imprisonment system is currently undergoing uncertain changes, showing high volatility due to its historical development and normative nature. Our account of the tensions between punishment and human rights in Israel over recent decades suggests that this field is highly volatile, making it difficult to predict future developments. Although Israel's constitutional and human rights-oriented reforms seemed to indicate progress, Israel also experienced a series of harsh and regressive statutory and penological reforms.

Introduction

Volatility and uncertainty are often used to articulate an unstable environment in markets or organizations. While Volatility refers to the rapid and unpredictable nature of change, Uncertainty expresses the unpredictability of events and issues (Bennis and Nanus 1985). These elements provide a lens we can use on our subject matter. We argue that the Israeli Imprisonment system in relation to human rights discourse is subjected to sporadic changes and uncertain direction, suggesting a high degree of volatility given its historical development and normative nature, making it difficult to forecast the future. In this article, we wish to provide a conceptual framework by offering a legal-sociological review of key issues in the development of domestic and international human rights standards related to incarceration.

A discourse on human rights in general, and international human rights norms in particular, has become widespread in modern times, especially since the adoption by

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the United Nations of the Universal Declaration of Human Rights in 1948 and the incorporation of its principles in a number of Conventions, which have, in turn, generated innumerable additional documents (designated collectively as "soft law"). While the interaction of this discourse with criminology and even with the mainstream penological literature has been limited (Murphy and Whitty 2013; Murphy and Whitty 2016; Lippert and Hamilton 2020; Savelsberg 2010), its application to the penal system seems to be gaining ground, with the use of human rights terminology being associated with enhanced protection of liberty and humane correctional regimes. The latter orientation has been promoted (inter alia) by the numerous publications of Dirk Van Zyl Smit in this area, and most notably, perhaps, has been his *Principles of European Prison Law and Policy,* jointly authored with Sonja Snacken (van Zyl Smit and Snacken 2009), while the application of the concept of the dignity of the offender has become increasingly widespread in this context (Tonry 2018; Simon 2021; Er'el and Shultziner 2015). The incorporation of human rights principles thus now appears to be an identifying feature of progressive and enlightened penology.

This somewhat sweeping conclusion should, however, be subjected to a number of reservations. In the first place, this topic is part of a wider debate as to the significance of the human rights discourse in contemporary politics. It has been argued that international law in general, and international human rights law in particular, have had only limited impact (Goldsmith and Posner 2005; Goodman and Jinks 2013), while the more focused attempts of international relations scholars to develop a model as to the conditions required for compliance with international norms have also met with limited success (see especially the "spiral model" developed by Risse et al. 1999; Risse et al. 2013), and also the attempt to apply this model to the prohibition on torture on the part of Israel's High Court (Laursen 2000). It is also arguable that in the context of penological history, the view that the UN Human Rights Conventions reflected a return to constitutional principles, thereby challenging the dominance of the positivist school of criminology with its focus on the perceived efficacy of treatment policies, was illusory—the demarcation between these two approaches remaining unclear and under-explored.

Our earlier (Hebrew language) publications in this area—one focusing on solitary confinement (Er'el and Sebba 2014), the second assessing more generally the extent to which the Israeli legal system can be said to comply with the international human rights norms (Sebba and Er'el 2017)—reached negative conclusions, in particular in the latter case. While Israel ratified the main United Nations Human Rights Conventions in 1991, this did not extend to many of the significant optional provisions, such as those providing for the submission of individual petitions to the Committees specified under these Conventions or OPCAT—the optional protocol under the Torture Convention, which provides for the comprehensive monitoring of prisons and other institutions whereby individuals may be deprived of liberty. Moreover, since Israel is not part of the Council of Europe (nor the EU), similar provisions falling under regional norms, such as the European Convention on Human Rights, are not applicable. Further, the Israeli Prisons Ordinance (dating from the era of the British Mandate but revised in 1971) continues to vest sweeping discretionary powers in the Prison Commissioner, whose powers outweigh not only the international human rights principles provided under the UN Conventions but also

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those adopted under Israel's "Constitutional Revolution." Finally, our study of the negotiations between Israel's representatives and members of the relevant UN Committees did not indicate a readiness on the part of Israeli state officials to take account of pressures exerted by UN personnel to apply principles reflected in the UN Conventions—particularly when non-Israeli citizens were involved, such as residents of the Occupied Territories or asylum seekers. We thus concluded that Israel failed to respect significant areas of international human rights, including Art. 7 of the ICCPR and the provisions of the CAT Convention regarding torture. However, given a degree of uncertainty on the part of Israel's Supreme Court judges as to whether persons sentenced to prison retain the full gamut of human rights with the sole exception being the deprivation of liberty, the maintenance of prisoners' rights has in recent years become increasingly identified with the high level of monitoring reflected in the requirements of the OPCAT protocol(s). Thus, in her doctoral dissertation, the second author has identified the preservation of prisoners' rights as conceptually linked (a) to the application of an effective independent monitoring system, (b) to recognition of the vulnerability and helplessness of persons held in total institutions (and the relevance in this context of the developing literature of disability studies), and (c) to the state's obligation to provide for the prisoner's rehabilitation—formally expressed in Art. 10 of the ICCPR and increasingly expanded upon in the academic literature.

However, while—as indicated above—Israel's failure to comply with the norms of international human rights law vis-à-vis prisoners and other persons deprived of their liberty may render Israel a significant offender in this context, it has recently emerged that many other states have shown ambivalence as to the extent of their compliance (and, indeed, of their perceived obligation to comply) with the UN and/or regional Conventions, thus suggesting a possibly growing gap between the formal norms of these Conventions and the actual practices of some of these states—as well as among prevailing public perceptions. Indeed, a recent Special Issue of the *European Journal of Criminology* on "Human Rights, Prisons and Penal Policies" (Cliquennois et al. 2021) analyzed a number of such case studies in which tensions have arisen in this context. Other such illustrations are included in the special issue of *Crime, Law and Social Change* (Cliquennois and Snacken 2018), while other articles with a similar theme have been published elsewhere. These analyses have been complemented by a reconsideration on the part of some of the institutional bodies (notably the European Court of Human Rights) of their processes and criteria for intervention. Conversely, some of the individual states have adopted reforms designed to enhance their compliance with international human rights norms—whether specifically intended for this purpose or as part of a more general policy for the reduction of punitiveness in general or of mass incarceration in particular. This present special issue of LSI thus provides an opportunity to compare recent developments in Israel, and its failure to fully comply with IHRL, with parallel developments elsewhere.

The article is structured as follows. The first section, as noted, will review recent developments in the literature relevant to compliance with international and/or constitutional standards of human rights norms—thereby providing the basis for a comparative perspective of developments in Israel. The second section will assess the success of Israel's attempt to constitutionalize human rights principles at both the national and international levels—following years of uncertainty and recurring

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allegations of the use of torture vis-à-vis the population of the occupied territories. The third section will focus on the impact of ratification of the UN Conventions in respect of both the weakness of their general application and the apparent failure of an Israeli initiative on prisoner rehabilitation—despite evidence of a degree of domestic support. The fourth section will provide an updated perspective on the ongoing issue of human rights in the Occupied Territories concerning torture. The fifth section will show how Israel internalized prevailing penological trends in punitiveness similar to those rampant in certain common-law cultures (notably the US), such as the prolonging of the duration of prison terms, whether deriving from protective measures for crime victims linked to the perceived dangerousness of the offender or from problematic release processes. By contrast, the sixth section will provide an account of recent attempts to revise or reconsider some of these punitive policies. The final section will attempt to summarize current trends and expectations.

Comparative Developments

Perhaps the most significant development of the human rights model in the context of prisoners is derived from the expansion of the role of the European Convention on Human Rights and its associated bodies. As the states of Central and Eastern Europe moved from the Soviet sphere of influence to that of the European Union, they became subject to the Council of Europe and its associated human rights agencies (including its Committee of Ministers), as well as the European Prison Rules. Moreover, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was accompanied by a monitoring committee (the CPT) which pioneered the monitoring of prisons and other institutions for the deprivation of liberty and has been operating since 1989, paving the way for the adoption in 2002 of OPCAT under the UN Convention against Torture—including the development of "preventive mechanisms" within the individual states.

Probably the most significant reform of the ECtHR (which preceded these developments) was the abolition of the Commission stage in 1998; as a result, all cases were brought before the Court, thereby substantially increasing the number of hearings and rendering this Court more activist (Klerk 1996). The reforms referred to in the recent literature, by contrast, mostly had the effect of restraining the extent to which changes in the policies of the national courts were imposed. Thus, for example, the "pilot judgment" procedure introduced in 2004 enabled the European Court to deal with state-based issues more systematically (Cliquennois et al, 2021, 15–16; Glas 2016). Another article by Cliquennois et al. analyses more comprehensively how the institutions operating within the framework of the ECHR and/or the EU have endeavored to adapt themselves to these challenges (Cliquennois et al 2021). The UK became notorious for its opposition to the recognition, on the part of the ECtHR, of the voting rights of prisoners, as indicated in Hirst v. United Kingdom [2005] (Bates 2014), and exercised symbolic leadership in restraint of the Court by organizing a meeting of European States in Brighton (Madsen 2016) An ongoing conflict between the Italian government and the European supervisory bodies focused on prison conditions, in particular overcrowding following the ECtHR pilot judgment in the Torreggiani case (Torreggiani and Others v. Italy 43517/09, ECHR, January 8, 2013; Caputo and Ciuffoletti 2018; Pichhi 2017). In light of the recent recognition and

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significance of monitoring bodies, the Special Issue of the EJCRIM shows how a non-European state (Australia) responded to the UN's instigation of OPCAT, while Jonathan Simon bewails the neglect of this topic in the US, despite its historical roots and its continuing existence in isolated locations (Simon 2018), and the severe restrictions imposed on the prevailing model of "adversarial legalism" court-imposed solutions under the Prison Litigation Reform Act of 1996.

Another significant development of recent decades that should be referred to in this context has been the attempt on the part of criminologists to explain the disparities between states that opted for punitive policies (in particular "mass incarceration") and those that did not, or at least were more moderate. The burgeoning literature on this topic was led by Michael Tonry (Tonry 2007) while much of the relevant comparative data has been contributed by Tapio Lappi-Seppala (Lappi-Seppala 2011).

The message conveyed by this literature was that a nation's imprisonment rate was not an inevitable outcome of the rates or patterns of its criminality, but rather a reflection of other variables—and thus largely a matter of its chosen policies (Cheliotis and Xanakis 2021; Snacken and Dumortier 2012). Criminologists and other policy-makers, including legislators (Aviram 2015) and the judiciary, have thus become occupied with the ways in which policies can be modified or new policies adopted in order to reduce imprisonment rates, while the literature referred to above also considers how these developments affect the interaction between state policies and international human rights bodies (Bernardi and Martufi 2016).

The Israeli Context

In these various contexts, Israel may provide an interesting case study—albeit characterized by considerable ambivalence. In the context of international law, Israel may arguably be seen as a product of twentieth-century international law, given that its very existence as an independent state and its borders were established under the UN General Assembly Partition Plan of 1947 for the termination of the British Mandate for Palestine.[1] Further, much of the human rights agenda developed by the various UN bodies was perceived as having been triggered by the atrocities committed during WWII, with the Jews as the primary victims. However, following its establishment in May 1948, the first Israeli government decided that the existing legal structures would remain in force until modified, and they thus continued to be characterized by features of British colonialism, including the vesting of emergency powers in the government. More particularly (in the context of our present topic), the *Prisons Ordinance* enacted shortly before the transfer of power vested almost unlimited powers in the Prison Commissioner. There was thus an absence of legal protection for minorities or others perceived as a security threat, a situation further aggravated by the occupation of the West Bank of the Jordan River in the wake of the Six-Day War. Further, an early decision of Israel's legislature determined that rather than adopting a constitution and raising divisive issues such as the status of the Jewish religion, a series of Basic Laws would be adopted over time, which, in their conclusion, would constitute Israel's constitution.

[1] A/RES/181(II) of 29 November 1947.

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Nevertheless, while the dominant ideologies of the early years of the State were thought to be collectivist rather than individualistic (Mautner 2011), some significant legal institutions were nevertheless established. The adoption of a Courts Law in 1957 established the Supreme Court, not only as the highest court of appeal, and granted it an additional status as the High Court of Justice, whereby it could grant remedies vis-à-vis public bodies "in the interest of justice"—specifically including *habeas corpus*. On the basis of this provision, a prisoner could request a hearing in the High Court [See H.C.J. 144/74 Livneh v. The Israeli Prisons Service 28(2) PD 686 (1974)]. Subsequently, however, this remedy was delegated to the district court judges in 1980.[2]

Moreover, while an underlying tension on the issue of the rights of the Arab minority in Israel and the status of the occupied territories has prevailed throughout Israel's history, there have also been persistent attempts to strengthen both the professional norms of legal bodies (notably within the Ministry of Justice) and to promote the academization of these bodies as well as the expansion of the academic institutions themselves (Kretzmer and Ronen 2021). These developments may partially explain the somewhat sudden emergence during the early 1990s of both the ratification of the UN Conventions and the adoption on the part of Israel's Knesset of significant human rights legislation. Thus, during the tenure of Dan Meridor as Minister of Justice in the government of Itzhak Shamir in 1991, the main relevant UN Human Rights Conventions were ratified by the Israeli government—albeit somewhat half-heartedly. Moreover, this was closely followed by the adoption of two Basic Laws in 1992—the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, with far-reaching implications for the development of human rights principles. The rights specified were not to be absolute; violations could be justified based upon four criteria as stated in the limitation provision, adding also the non-retroactivity provision of the basic laws.

The adoption of these laws was perceived by many as a constitutional revolution, given that they were to operate as a restraint not only on Knesset legislation, taking into account the provision that "all governmental authorities must respect these rights." More significant would be the manner in which the new provisions would be interpreted by Israel's Supreme Court. The invalidation of legislation was of course the more sensitive usage of the Court's powers but this power has been used sparingly (Lurie and Shany, 2019). Nevertheless, the Court became identified both internally and among the international legal community as highly activist (Bendor and Segal 2011), and from the perspective of the present article, the text of Basic Law: Human Dignity and Freedom has created wide opportunities for prisoners and other detainees to argue that they have been deprived of liberty or undergone an infringement of their dignity, whether deriving from the sentence imposed or from their treatment on the part of the prison authorities.

However, while there is extensive literature on Israel's adoption of the Basic Laws in 1992 and their constitutional significance, relatively little has been written about the ratification of the UN Conventions—or, indeed, on the relationship between these two developments, which were significantly different in substance. A common element noted in this context by Barak Medina appears to have been the desire of the then Minister of Justice, Dan Meridor, to promote the norms of justice as he perceived

[2] See articles 62a–62d of Prisons ordinance 1971, and Rules of Procedure (Prisoners' Petitions) 1980.

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them (Medina 2017). According to Medina, Meridor "initiated these two processes based on the view that Israel's commitment to respect human rights should be entrenched in formal decisions, but each of the two decisions aimed to achieve a different purpose. The enactment of the Basic Law was directed internally, to strengthen the protection of human rights in Israeli law, while the ratification of the treaties was directed externally, to express to the international community Israel's commitment in this area" (Medina 2017, 347).

Following the ratification of the UN Conventions in 1991, Israel became both subject to their substantive norms and obligated to the processes laid down including the submission of periodic reports and other procedures, which we will consider in greater detail below. It seems, however, that expectations as to the impact of the ratification on the policies and jurisprudence of the Israeli courts were limited (Medina 2017, 349).

Nevertheless, while prior to the 1990s Israel's Supreme Court occasionally delivered a decision in favor of prisoner's rights, the combination of the ratification of the UN Conventions and (more particularly) the adoption of the Basic Laws may well have encouraged this; the Basic Laws as applied in these cases being perceived as having transformed Israel from a regime of parliamentary sovereignty to one embodying the distinctive features of a constitutional democracy.

Notable decisions on the part of Israel's Supreme Court (in its capacity as the High Court of Justice) since that time include the overturning of an elaborate law providing for the establishment of a private prison primarily on the grounds of the infringement of prisoners' human rights [HCJ 2605/05 The Academic Center for Law and Business v. Minister of Finance (2009)]. On a further three occasions, the Court invalidated legislative provisions for the incarceration of asylum seekers (HCJ 7146/12 Adam v. The Knesset (2013); HCJ 8425/13; Eitan v. The Israeli Government et al (2014); HCJ 8665/14 Desta v. Minister of Interior et al., (2015)) Surely no less dramatic was the Court's decision on prisoner overcrowding (HCJ 1892/14 ACRI v. Minister of Internal Security (2017)), guaranteeing the right to a minimum cell space per prisoner, echoing the Brown vs. Plata decision in the US (Brown v. Plata, 563 U.S. 493 (2011)), although the delays involved in its implementation were continuing at the time of writing this article.

More significant, however, in the context of international human rights law and punishment, in the light of the texts of the UN Human Rights Conventions, with their emphasis on the prohibition of torture (HCJ 5100/94, Public Committee against Torture Israel v. Government of Israel (1999)), has been the ongoing saga on this topic over several decades, which culminated in the judicial prohibition on the use of torture in the penal system, yet the scope and effectiveness of this prohibition continue to remain in doubt. Similarly, the related issue of the force-feeding of prisoners on hunger strike remains controversial, as well as the legality of solitary confinement and the manner of its monitoring (Mandela Rules 2015, §83–85).

Human Rights and Prisons in the wake of Israel's ratification of the UN Conventions

The marginal role attributed by Israel's Supreme Court to the ratification of the UN Conventions was described in the previous section as the basis of the statistical analysis by Barak Medina (Medina 2017). In an earlier publication, the authors of the

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present article undertook a detailed study of the extent to which human rights norms, specifically applicable to prisons and prisoners under the UN Conventions, had been internalized by Israel's criminal justice system following ratification, adopting a more formal legal analysis (Sebba and Er'el 2017). The point of departure for the authors was based on the universal application of human rights under the UN Conventions. Article 2 of the ICCPR states "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Thus, in our view, the default approach of the UN Conventions is that prisoners are not, in principle, deprived of their human rights if sentenced to prison following due process. To cite the famous dictum of Lord Wilberforce in *Raymond v. Honey* [1983 A.C. 1] "under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication." This approach implicitly rejects the idea that a prison sentence results in a "forfeiture of rights" (Mavronicola 2015, 729). This position was echoed by Justice Aharon Barak in the *Katalan* case, who declared that "Prison Walls do not sever a detainee's right to human dignity" (HCJ 355/77 Katalan v. IPS 34(3) PD 294).

It seemed to the authors, however, that—despite expectations—ratification of the UN Conventions had done little to promote the internalization of international human rights law in general, and prisoners' rights in particular. This conclusion is derived from a number of factors. In the first place, it should be noted that in Israel, as with most other common law jurisdictions, international treaties do not become part of the domestic legal system unless expressly adopted by legislation. Since no such legislation was enacted following the ratification of the UN Conventions, their legal impact has been limited, thereby inhibiting a potential process of familiarization with the international norms on the part of professionals active in this field—as well as with the wider public. Moreover, while the significance of the UN Conventions and their implications for the penal system should not be underestimated, the UN Conventions themselves actually include few provisions specifically applicable to prisoners. Perhaps better-known has been the Standard Minimum Rules for the Treatment of Prisoners (now reincarnated as the Nelson Mandela Rules), but these have generally been perceived as "soft law" and thus not binding (Rodley and Pollard 2009). Moreover, in some areas (in particular norms related to solitary confinement), the authors found a lack of coordination among the views expressed by various international bodies, including their specific proposals (Sebba and Er'el 2017, 162–164).

Absent a new set of binding norms applicable to prisoners, the Israel prison administration continues to be governed by the Prisons Ordinance dating from the Mandatory period, reissued in a Hebrew Version in 1971. As noted, this Ordinance is dominated by the authority of the Prison Commissioner, who has general control over the prisons (see sec. 80 (a) of the Ordinance), in the spirit of the hierarchical structure of government dating from the colonial period. With the approval of the Minister of Police (now Minister of Internal Security), the Commissioner may issue general orders at his or her discretion (sec. 80A)—including the innumerable "Commission Orders" under which most prison activities are regulated in great detail (sec 80A (b)). These Orders take precedence over international human rights norms in the courts'

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decision-making. Furthermore, since most of the "Commission Orders," as well as the regulations or rules issued by the Minister for Internal Security, pre-date the adoption of Israel's Basic Law: Human Dignity and Liberty, they cannot be challenged under this law (Er'el and Shultziner 2015), given its "saving" provision.

Another significant limitation of Israel's application of IHRL norms derives from the minimalist approach of the Israeli government to their ratification. In the first place, Israel has sometimes expressed reservations as to its acceptance of particular Convention norms (Sebba and Er'el 2017, 129, n. 20). More significant, however, has been Israel's failure to ratify the various optional clauses or protocols whereby complaints may be submitted to the monitoring body by or on behalf of persons perceived as victims of violation by a state party of the provisions of the Convention. Most significant of all would be Israel's ratification of the Optional Protocol to the Convention against Torture (OPCAT), adopted by the UN General Assembly in 2002, establishing a sub-committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), comprised of twenty-five "independent and impartial experts" for the monitoring of institutions in which persons are deprived of their liberty. The Protocol also requires that each signatory party, under the guidance of the SPT, establish a National Preventive Mechanism, thereby encouraging a higher degree of local identification with the monitoring process (Olivier and Narvaez 2009; Egan 2009; Aizpurua and Rogan 2021). Clearly, adherence to OPCAT can be a key factor in the monitoring of prisoners' rights. In the absence of such options, the status of prisoners in Israel is only monitored under the traditional processes, whereby periodic reports are filed according to the provisions of the particular Conventions, and the discourse between Israel's official representatives and the monitoring committees has often been problematic.

Following Israel's ratification of the UN Conventions in 1991, Israel became obligated to submit reports to the relevant monitoring bodies at the times specified, which vary from Convention to Convention. Based on our reading of these reports (or at least those most relevant to the theme of this article), the tension between the state's approach and that of the UN bodies seems to have derived from three main issues:

A. The first problem seemed to be the Israeli government's reliance on the rhetoric of citations from High Court cases to legitimize the actions of the Israeli prison authorities, with the implicit message that such actions were consistent with international human rights law, or at least with Israel's new constitutionalism under the Basic Laws of 1992. Thus, Israel's initial report to the Human Rights Committee, as required by the ICCPR, included a survey of prisoners' rights under Israeli law, specifying that "The fundamental right of detainees and prisoners to conditions insuring basic maintenance of their human dignity has been articulated and enforced in a long line of judgments of the Supreme Court." However, apart from the fact that the cases were considered by that court only because the prison authorities had rejected the prisoner's initial request or claim—in many cases, the decisions reached were not being "enforced" as binding rights but rather were a reflection of the Court's rhetoric (Sebba and Er'el 2017). Similarly, Israel's second report included two citations from the judgment of Justice Barak in the *Yoseph* case [HCJ 540/84, Yoseph v. Director of Central Prison of Judea and Samaria (1986)], to the effect that the infringement of liberties should be restricted to those directly arising from the nature of

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imprisonment and no more. The second citation asserted "the right of a person in Israel who has been sentenced to prison or lawfully detained to be held in conditions that enable cultural human life" [HCJ 221/80 Dervish v. IPS 35(1) PD 536, 538 (1980)]. These citations reflected the Court's reservations regarding the treatment of "security prisoners" who had been convicted in Israeli courts but were being held in facilities in the occupied territories where the conditions were inferior. The petitioners requested that they be "returned to a facility within Israel's borders or be granted the same conditions relating to employment, furloughs, eating conditions, rehabilitation system, and other matters." Departing from practice, the judges paid a visit to the facility in question and noted the deficiencies. While the Court indeed requested the Prison Governor to promote changes in the areas specified, some of which required legislation, it refrained from formally allowing the petition, adding "we take no position in relation to the respondent's decisions." This formulation is surely a far cry from the claim of the prison authorities that they were articulating and enforcing judgments of the Supreme Court (emphasis ours).

B. Further, the rights referred to in the instant case were mostly not echoes of specific Convention rights, although the concept of equality between the status of Jews and Arabs would indeed reflect Convention principles. At the same time, the idea that the above-mentioned rights attributed to Israeli prisoners (whether "security" or otherwise) are "assured" is surely meaningless, given the continuing validity of the provision of the Israel Prisons Ordinance, whereby virtually all topics are subject to the Prison Commissioner's "Commission Orders."

Further, Rule 19 of the Prison Rules of 1978 specifies that, in addition to the vested rights of prisoners under the legislation, a Prison Governor may, in accordance with rules laid down by the Prison Commissioner, grant "privileges" to prisoners, whether individually or by category, such as visits, letters, furloughs, purchases, media access, etc., conditional on good conduct. This wording makes it clear that these activities are not recognized as pertaining to prisoners' rights but are granted at the discretion of the prison administration.

C. Since ratification and the submission of reports to the relevant UN bodies (Sebba and Er'el 2017, 201), there has been an ongoing saga in relation to prisoners kept incommunicado for protracted periods of time in harsh conditions. As noted above, a disciplinary offense among those defined in Israel's Prison Ordinance allows the authorities to impose a sanction of isolation for a maximum of fourteen days (although no single period may exceed seven days). Additionally, however, wide-ranging discretionary powers based upon administrative considerations have been exercised in order to hold a prisoner in isolation for an indefinite period that can amount to months or even years (Sec. 19A of the Prisons Ordinance), thereby involving Israel in the international controversy as to the use of solitary confinement, with its apparent revival towards the end of the twentieth century (Er'el and Sebba 2014). The outcome of its extensive use in Israeli prisons at that time, notably, but not exclusively, for "security offenses," was a public campaign leading to the adoption of Amendment no.18 (2000) to the Prisons Ordinance on "Prisoners held Separately." While its various provisions defined the powers of different prison personnel in relation to "administrative separation," its main provision was to require the intervention of a court order if the period of separation was to exceed six months ("separation by court order") (Sec 19E).

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The continuing use of solitary confinement in Israeli prisons has attracted the attention of the UN monitoring bodies. The submission of Israel's 3rd Report to the HRC in 2008 was followed by a request to address a number of specific questions in light of a reference to a delay in permitting security offenders to meet their lawyers—with the possibility that the latter would be held in incommunicado detention for three months. The Committee added three questions relating to (a) data on the numbers of security prisoners, (b) an account of the conditions of solitary confinement, and (c) data on those so held, and the duration and grounds for being so held. In response, the state provided a survey on a variety of topics, including the conditions of security offenders—a topic the request had not addressed. Our main point, however, is that under the heading "solitary confinement," the state's response focused exclusively on prisoner isolation as a disciplinary sanction, and the twenty lines of response were devoted to showing the legality of this sanction—whereas the question had, in our view, related to the extent of usage of a different institution; ie, the discretionary use of solitary confinement. As noted, this institution had been established in Israel on an administrative and arbitrary basis—and may have endured for months or even years, whereas the disciplinary sanction may last only fourteen days, so is easier to defend as legal.

It is hard to grasp the apparent failure of the Israeli authorities to understand the nature of the Committee's queries, given the universal controversy surrounding the institution of solitary confinement and the Amendment to the Prisons Ordinance, adopted in 2000 as a response to these controversies, and the preference of the state bodies in their responses to focus on the separation of the prisoner as a short-term disciplinary sanction. It is hard to perceive this as anything other than deception. Unfortunately, the same approach seems to have been adopted in the context of the state's fifth response to similar questions emanating from the CAT committee, even though their question was formulated more clearly; the question is "Have any steps been taken to amend current legislation in order to ensure that solitary confinement remains an exceptional measure of limited duration, in accordance with international minimum standards, as recommended by the Committee following the consideration of the previous report?".[3] Even here, Israel's governmental representatives chose to understand that the concern of the UN Committee related to disciplinary sanctions of up to two weeks—not to (long-term) solitary confinement, misleadingly referred to as Prison Order 04.13.00, which provides details of disciplinary sanctions as though these were the basis for long-term (administrative) solitary confinement.

The UN Conventions, Torture and the Occupied Territories

Israel's treatment of the population of the Occupied Territories has inevitably been a topic of focal interest for UN committees because the status of the Occupied Territories is consistently on the UN agenda and is raised by various Palestinian-related NGOs in the "Shadow Reports" they submit following the periodic reports submitted by Israel. It is interesting to note, however, that the legality of torture has also been of prime interest to Israeli-based NGOs (and Israeli academia in general), as

[3] *Periodic Report of Israel (CAT/C/ISR/5)*, CAT/C/ISR/Q/5 (12 July 2012), para. 18.

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reflected in the petition in the PCATI (Public Committee against Torture in Israel) case that occupied the Israeli Supreme Court for many years.

While the space here does not allow for a review of the extensive literature on the status of human rights in Israel in the wake of the Occupation, Kretzmer and Ronen show how both international human rights law and Israeli administrative law have "served as a basis for the Court's judicial protection of human rights" (Kretzmer and Ronen 2021, 88).

In light of art. 7 of the ICCPR, whereby "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and the separate Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the topic of torture may be thought to lie at the heart of the literature on human rights and punishment. However, this topic tends to be identified primarily with pre-trial interrogations rather than the (more routine) administration of prisons and treatment of prisoners. While it raises the wider question of the prison conditions under which so-called "security" prisoners are held—and in particular comparison with the treatment of "criminal" prisoners—in most cases the issues raised in the context of such comparisons (e.g., entitlements to furloughs or family visits) do not fall into the category of torture. Two related sub-topics, however, which have arisen in the Israeli context, may nevertheless be relevant here: (a) the widespread use of solitary confinement which we have discussed above, and (b) the legality of the force-feeding of prisoners on hunger strike.

Force-feeding of prisoners on hunger strike: while a comprehensive comparison of the conditions under which "security" and "criminal" prisoners are held is beyond the scope of this article, it should be noted that, while in principle, the rights (or "privileges") granted to the former are more restricted; they have over the years often benefited from greater autonomy, whether based on the affiliation of the particular category (i.e., political affiliation) of the prisoners in question or on negotiations at the local (prison) level between the prison authorities and the representative of the group in question. However, changes in the norms being applied as a result of political (or populist) pressures, competition among the Palestinian political organizations, or pressures related to negotiations for a prisoners' exchange, occasionally give rise to threats of a hunger strike—and the fear that this, in turn, will lead to a major eruption within or outside the prisons.

Such concerns led the Knesset to adopt Amendment no. 48 to the Prisons Ordinance in 2015, whereby a Court could authorize such a process, despite voices on the part of the medical profession that it would amount to torture. However, the topic has not been addressed directly by the UN Conventions, and the jurisprudence of the European Court of Human Rights and individual states is far from uniform. Thus, Israel's High Court of Justice rejected a petition on behalf of the Israel Medical Association, arguing that the law violated both international norms and Israel's Basic Laws, although the justices were troubled by the rationale of the law, which specified not only the prisoner's well-being but also considerations of national security.

Given the declining support for the Prison Rehabilitation Authority, political support emerged for an attempt to legislate Art. 10.3 of the ICCPR whereby "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Thus, consistent with Israel's claim in its initial Report to the Human Rights Committee as to the

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"overarching policy priorities" of the system, the 4th Periodic Report included references to Amendment no. 42, citing the new sec. 11D (a) of the Prisons Ordinance, whereby "the Prison Commissioner will examine the possibility of rehabilitating a prisoner who is an Israeli citizen or resident and will take steps towards his maximal involvement in rehabilitation measures in the prison." However, apart from the gap between this orientation and the actual practice as described in the State Comptroller's Report, the precise formulation of the new provisions is far from any recognition of a prisoner's right to rehabilitation. Sec. 11D merely provides that "the Prison Commissioner will explore possibilities for the rehabilitation of a prisoner who is an Israeli citizen or resident and will take measures for his maximum integration into the rehabilitative activities within the prison walls." Apart from the selective application of this provision, it is clear that absolute discretion for its implementation remains with the prison administration—a continuation of the policies dating from the Mandatory era referred to above. Generally, however, the concept of offender rehabilitation appears to be widely supported (Mavronicola 2015, 739, 742).

Punitiveness and the Neo-Liberal Turn

There is perhaps some irony in the fact that just as the Constitutional Revolution was taking root in Israel, supplemented by recognition of the role of international human rights law and the status of the UN Conventions, Israel was also feeling the impact of harsher penological policies akin to those described at length in contemporary American and UK literature, making use of such concepts as "penal populism" and "the culture of control," the origins of which were widely attributed to the neo-liberal policies of Reagan and Thatcher. These were echoed in numerous parliamentary proposals for harsher penalties—including, specifically, a proposal based upon the concept of "three strikes and you're out," in the application of budgetary pressure on the Prisoner Rehabilitation Authority, in favor of increasing privatization and (by default) the development of "private" rehabilitation programs. Moreover, the global trend in favor of "back-door" criminalization, whereby the penal system (as well as alternative strategies) are utilized to control populations seen as threatening or undesirable (Ashworth and Zedner 2014) did not pass Israel by. A 2001 law (unrelated to 9/11) authorized the detention of "unlawful combatants" for subsequent use as negotiating chips. More significantly, the Infiltrators Law, dating from the 1950s, prior to the establishment of Israel's borders, was amended in 2011 providing for long-term detention of asylum seekers (mostly refugees from Sudan and Eritrea) who crossed into Israel via Egypt. These two sets of provisions amounted to forms of administrative detention (already available for "security" offenders under the Administrative Detention Law), and their constitutionality was challenged in an ongoing battle (mainly in the context of the second law) between the Knesset and the government on the one hand and the Supreme Court on the other—leading to the quashing of the legislation (at least in part) by the Court, to be followed by legislative reformulation.

Many of these developments, in particular the growing harshness of the criminal justice system, followed by the growing interest and concern for the rights of crime victims where there was a perception of social or physical vulnerability. One outcome

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of these concerns was that two prison-related functions that had historically been perceived as routine procedures—the one-third reduction in the prison term imposed by the sentencing court for good behavior, and the commutation of the life sentence—now became the focus of a new law—the Conditional Release of Prisoners Law of 2001, which comprised forty-eight sections, the adoption of which occupied the Knesset for much of the 1990s and has continued to do so since that time with the adoption of a further seventeen amendments.

Further, given the concerns of the 1990s for public opinion in general and victim protection in particular, the new provisions were reoriented to the requirement that a prisoner seeking remission of a sentence should provide evidence that his or her release would not constitute any risk to the public—or the victim. These concerns were further elaborated in the context of topics such as sex offenses and domestic violence, where the penological literature indicated that professional expertise could assist in the assessment of risk. Also, additional procedures were specified.

In addition, the commutation function applicable to prisoners sentenced to life imprisonment was integrated into the new Conditional Release of Prisoners' Law. A complicated negotiation resulted in establishing two special committees to deal with this topic—in addition to a regular release committee for decisions unrelated to life sentences. The new legislation also provided that the commutation decision would normally take place only after a prisoner sentenced to life had served seven years of his or her sentence, and the initial commutation would be for a term of no less than thirty years.

While the developments referred to, in all their harshness, involved primarily the traditional institutions of punishment (the courts, the President, administrative bodies, and penological experts)—a third measure that was adopted in this area a few years later was radically different, in that it involved usurpation of these institutions by the (political) executive. This reform was focused on the issue of the collective release of political or "security offenders" as part of a prisoner exchange. Such measures inevitably give rise to extreme emotions but had previously lacked any explicit normative framework and, until recently, required manipulation of the regular legal structures for their implementation. In 2014, however, in the wake of the Gilad Shalit prisoner exchange and the kidnapping of three teenagers in the West Bank, an exhaustively detailed "amendment" to the so-called Government Law was adopted. Under these provisions, the traditional niceties of constitutional balancing in the course of prisoner release decision-making were swept aside in favor of absolute governmental control of the process. Such control does not, however, end with the release decision itself. Contingency plans were incorporated into the legislation for a subsequent reversal of the release policy and the re-arrest of the prisoners, guided only by political expediency, with further detailed provisions for the quasi-judicial procedures to be followed in such cases and the rules of evidence to be applied.

Thus, we see that quite soon after the constitutional and human-rights-oriented reforms of the preceding years, apparently indicative of an enlightened era, Israel underwent a series of harsh and retrograde statutory and penological reforms. Based on comparative data on the relative harshness of penal systems (prison rates), published by the Institute for Criminal Policy Research, by comparison with Western European states, Israel could no longer be considered as among the more progressive,

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even if "political" prisoners are excluded from the calculation (ICPR, World Prison Population List, 12th ed. p.9).

Attempts to Reverse the Punitive Trend

The first decades of the twenty-first century appear to be characterized by various attempts to modify (or even undo) the trend to punitiveness in general and mass incarceration in particular. In the US, this development was doubtless encouraged by the near unanimity of the penological community in its opposition to these policies—with strong support from European colleagues anxious to avoid their importation (Snacken and Dumortier 2012; Daems et al 2013), as well as from liberally-oriented NGOs, all of which drew attention to the social harms to which these policies gave rise, such as the disruption of struggling communities directly impacted by high prison rates, deteriorating prison conditions, and the absence or failure of rehabilitative policies. In addition, attention was drawn to the enormous financial cost of mass imprisonment, which served as an incentive to reconsider prevailing policies (Aviram 2015). As a result of such pressures, think tanks began to adopt a new orientation.

While there is usually a time lag before Western (and in particular Anglo-American) penal policies are adopted in Israel, the attempts to reverse the trend to punitiveness appear to have occurred with greater speed and determination in Israel than elsewhere and have been reflected in three specific developments during the period in question. The most clearly related development was the establishment of the Dorner Committee in 2011, appointed by the government specifically to consider the issue of penal reform and the role of imprisonment in the rehabilitation of the offender.

Its Report was submitted in 2015 and the declared policy of reducing the use of prison sentences in the interests of prisoner rehabilitation seems not to have been seriously challenged; their recommendations were approved by the government and funds were allocated for the reforms.

The reform processes set in motion by the Dorner Committee received a significant boost with the High Court decision in the Prison Overcrowding case, delivered by Justice Elyakim Rubinstein in 2017. Influenced by the California overcrowding case, the High Court held that conditions currently prevailing in Israeli prisons were in breach of both international standards and the Basic Law: Human Dignity and Liberty. The Court ordered that, within nine months, each prisoner be allocated a minimum of 3 sq. meters of living space—to be increased within eighteen months to a minimum of 4 sq. m.–4.5 sq. m., including space for the toilet and shower.

The requirement set by the High Court decision may be seen to dove-tail with the recommendations of the Dorner Committee, for, insofar as policies are adopted to reduce levels of imprisonment, it will be easier to comply with minimum standards of space—although the latter can also be met by prison building. Inevitably the relevant government ministries have attempted to coordinate their policies, both of which have involved legislative measures in order to meet the High Court's deadlines. It is certainly arguable that, without the binding nature of the High Court's decision, prison conditions in Israel would not have benefited from significant improvements.

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Indeed, the thrust of the Dorner Report seems to have been in the direction of a reduction in the use of imprisonment rather than improving conditions.

The dramatic character of these two developments—the establishment of the Dorner Committee and its recommendations on the one hand, and the High Court's "minimum space per prisoner" case on the other—should not be underestimated either from the symbolic perspective of generating socio-legal change or in terms of their practical substance, even though the precise impact in both cases may still be hard to predict given the ongoing interactions among the relevant agencies. On the other hand, a third development that took place at about this time may be no less significant in terms of its long-term impact on the level of punishment in Israel. We refer to the Structured Sentencing Law, an amendment to the Penal Law of 1977, adopted by the Knesset in 2012.

In Israel, the Goldberg Committee was established to consider these issues in 1996, and its recommendations were published in 1997. While the underlying principle of desert (or its Hebrew equivalent of "appropriateness," requires the punishment to be proportional to the severity of the crime committed) seemed to have been widely accepted, and the concept of "sentencing guidelines" that would determine "departure points" for considering the sentence was acceptable to a majority of the Committee, a strong minority took the view that "appropriateness" and "departure points" should address various other aspects of the sentence—including minimum severity. Had this view prevailed, the trend to punitiveness reflected in the provisions of the Conditional Release of Prisoners' Law of 2001 might also have dominated Israel's sentencing policy.

Whether, because of the Second Intifada or other political developments, the Goldberg proposals were not progressed at this time. However, a Knesset Bill was tabled in 2006, and the basis of the Bill was the majority view of the Goldberg Committee; but while token support was expressed for the establishment of a Sentencing Commission to determine "departure sentences," the Bill was enacted without this component. Instead, each sentencing court would identify its own range of "departure sentences" for the offense in question, before selecting the appropriate sentence from within this range for the current case.

Perhaps even more significant was the fact that at all relevant stages, the Knesset Committee continued to adhere to the principle of desert as the overriding objective of punishment, while other factors or objectives, if considered at all—were to be secondary. This meant that considerations related to the offender's potential dangerousness, including his or her previous convictions, were only to have a limited impact on the sentence. In this respect, the three reforms referred to appear to operate in tandem.

Conclusions

Our account of the tensions between punishment and human rights over recent decades suggests that there is a high degree of volatility in this field, indicating that it may be difficult to predict future developments. For while, on the one hand, the policies that need to be adopted to promote compliance with international human rights norms are clear and indeed have been laid out by the authors in their previous work, with emphasis on adherence to the various options available under the

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UN Conventions and implementation of the provisions of the Nelson Mandela Rules, the manner in which Amendment 42 to Israel's Prison Ordinance has been adopted seems to reflect an overriding reluctance to waive the current wide discretion of the prison authorities. On the other hand, however, most of the positive transitions that have taken place, beginning with the constitutional transformations of the 1990s and including the three recent reforms described in the previous section were themselves quite unpredictable—so future developments remain uncertain. It seems that the initiative for instigating these reforms may be the result of outside pressures, or may derive from the institutions involved themselves without such pressure. The remainder of our discussion will attempt to differentiate between these two possible sources of influence/impact.

Israel is dependent financially, militarily, and politically upon various outside forces, including the US government, the EU, and political decisions; e.g., relating to building in the Occupied Territories or granting permits to Palestinians in the Gaza Strip or elsewhere to work in Israel are attributed to pressure on the part of the representatives of these bodies—as was also the case during the various stages of peace negotiations. Similar pressures could be applied to promote human rights in the context of punishment—although this seems to rarely occur. Further, initiatives on the part of the UN bodies that implement the UN Conventions, possibly involving their own procedures, akin to the reforms undertaken by the ECHR, might also be undertaken in order to enhance the monitoring provisions of the UN Conventions—in particular OPCAT.

As indicated, initiatives arising within the functioning of traditional state bodies are another possibility (also known as National Preventive Mechanisms—NPMs). Steps were taken a few years ago towards the establishment of a Human Rights Commission, which might have led to reforms in this area. Israel also has a State Comptroller with wide-ranging powers, which sometimes draws attention to malfunctioning in the area of criminal justice and prisons. As noted, the Ministry of Justice sometimes launches an initiative for criminal justice reforms— most recently with a proposed Basic Law: Rights in Criminal Proceedings. Israel also has a profusion of human-rights-oriented NGOs.

Finally, Israel has an unusually flexible approach to appointing judges, which requires a majority vote by a committee comprising Supreme Court judges, government ministers, Knesset members, and practicing lawyers. Unpredictable judicial decisions may thus occasionally trigger unforeseen developments.

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